



April 26, 2001

Mr. Larry W. Schenk
City Attorney
City of Paris
P.O. Box 9037
Paris, Texas 75461-9037

OR2001-1709

Dear Mr. Schenk:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146487.

The City of Paris (the "city") received a request for: (1) a "[s]urvey of salary and other benefits for City employees, conducted by the City of Paris at any time from January 1, 1999 to present," and (2) a "[s]urvey of salary and other benefits for City employees, conducted by the Texas Municipal League at any time from January 1, 1999 to present." You state that you have released some of the requested information. However, among other arguments, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your arguments with respect to the information in Exhibit D, which consists of working papers and drafts of a salary study being conducted by a consultant for the city. You contend that this information is not "a survey conducted by the City" for purposes of the request, and therefore is not responsive to the request for information. While the Public Information Act does not require a governmental body to make available information that does not exist, the governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975); *see* Gov't Code § 552.353 (providing penalties for failure to permit access to public information). Here, we believe the city consultant's working papers and drafts of the salary study are responsive to the requestor's request for a survey of salary and other benefits conducted by the city. *See* Open Records Decision No. 462 at 14 (1987). You also argue that, under section 552.022(a)(1) of the Government Code, "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is made expressly public. Thus, you contend that because the salary survey is incomplete, the survey information in Exhibit D is protected by

section 552.022 until the survey is complete. However, section 552.022 does not serve as an exhaustive list of public information or as an exception to the release of information by negative implication. Rather, it lists eighteen categories of public information that generally may be withheld only if confidential by law or, in the case of completed reports, if excepted under section 552.108 of the Government Code. See Gov't Code § 552.022 (Section 552.022(a) expressly states that it does not limit "the amount or kind of information that is public information under this chapter."). Therefore, you may not withhold Exhibit D under section 552.022.

You further argue that Exhibit D is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception applies not only to a governmental body's internal memoranda, but also to memoranda prepared for a governmental body by its outside consultant. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152, 158 (Tex. App.--Austin 2001, no pet. h.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. However, an agency's policymaking functions do include administrative and personnel matter that affect the governmental body's policy mission. Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 159-60; ORD 615 at 4-5.

In Open Records Decision No. 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the advice, opinion, and recommendation of the drafter with regard to the form and content of the final document, so as to be excepted from public disclosure under the statutory predecessor to section 552.111. This office further concluded that section 552.111 excepts factual information in the draft to the extent the factual information also will be included in the final version of the document. *Id.* Thus, section 552.111 excepts from disclosure the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *Id.*

You indicate that the information in Exhibit D consists of draft papers of a wage and salary survey that are in the early stages of development. While you acknowledge that the final survey will be subject to public disclosure under section 552.022(a)(1) of the Government Code, you seek to withhold the draft papers under section 552.111. We agree that the information in Exhibit D relates to the policymaking functions of the city. Furthermore, because Exhibit D consists of draft documents, we find it necessarily consists of advice, opinion, and recommendations regarding the policy matter. Therefore, we find that you may withhold Exhibit D in its entirety under section 552.111.

We next turn to the information contained in Exhibits B and E. Exhibit B consists of a 1999 salary survey conducted by the city. Exhibit B contains information taken from volumes of the Texas Municipal League's ("TML's") "Salaries & Fringe Benefits of Texas City Officials." Although you have released most of the information in Exhibit B, you seek to withhold portions of the survey that were taken from TML's publications. Exhibit E consists of copies of pages from TML's "Salaries & Fringe Benefits of Texas City Officials." You contend that volumes of TML's "Salaries & Fringe Benefits of Texas City Officials" are commercially available and therefore need not be released pursuant to a request for information. Section 552.027 of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

...

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Based on the information you have provided, we agree that, pursuant to section 552.027, the city is not required to provide TML's "Salaries & Fringe Benefits of Texas City Officials" to the requestor. However, we do not believe that the information in Exhibit B that was taken from TML's publications is covered by section 552.027 because this information is no longer "in a commercial book or publication ... [that] is commercially available to the public." You also contend the information taken from volumes of TML's "Salaries & Fringe Benefits of Texas City Officials" is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal copyright law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, the federal copyright law does not provide for the confidentiality of copyrighted information. *See generally* 17 U.S.C.A. ch. 1; *see also* Attorney General Opinion JM-672 at 2-3 (1987) (public is allowed to inspect

copyrighted information unless other exception to disclosure applies). Therefore, the city may not withhold the information in Exhibit B taken from volumes of "Salaries & Fringe Benefits of Texas City Officials." However, to the extent the information contained in Exhibit B is protected by copyright, the city must comply with the copyright law and is not required to furnish copies of the copyrighted information to the requestor. Rather, the city must only allow the requestor to inspect the copyrighted information. Attorney General Opinion JM-672 at 2-3 (1987); *see* Gov't Code § 552.027(c). If the requestor wishes to make copies of copyrighted information, the person must do so unassisted by the city. In making copies, the requestor assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the city may withhold Exhibit D under section 552.111 of the Government Code. Furthermore, under section 552.027 of the Government Code, the city is not required to disclose the requested TML surveys to the requestor. Finally, the information in Exhibit B is not excepted from disclosure. To the extent the information in Exhibit B is protected by copyright, the city is not required to furnish copies of the information to the requestor, but the city must make the information available for inspection by the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

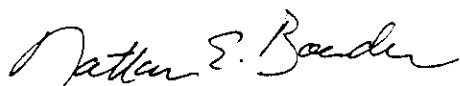
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/rr

Ref: ID# 146487

Encl.: Submitted documents

cc: Mr. Mike Higgins
Texas State Association of Fire Fighters
627 Radam Lane
Austin, Texas 78745
(w/o enclosures)